Supreme Court, U.S.
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No. 94-324

In The

Supreme Court of the United States

October Term, 1994

TERRANCE R. MOUNT and SHARON G. MOUNT,

Petitioners,

vs.

EL DORADO COUNTY SUPERIOR COURT,

Respondent,

STATE FARM FIRE AND CASUALTY COMPANY,

Real Party in Interest and Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of California Of A Decision Of The Court Of Appeal Third Appellate District Of A Decision Of The El Dorado County Superior Court

BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST

JAMES R. PAGLIERO, ESQ.
California State Bar #095898
PAGLIERO, CARTER & BAUER
1851 Heritage Lane, Suite 201
Sacramento, California 95815
Telephone: (916) 641-7273
Attorneys for Real Party in Interest State Farm Fire and Casualty Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Have petitioners, by submitting and receiving payment for fraudulent insurance claims, committed bank fraud under the provisions of Title 18 U.S.C. § 1344 and/or wire fraud which affects the financial institution under the provisions of Title 18 U.S.C. § 1343 so as to invoke the ten year statute of limitations provided under Title 18 U.S.C. § 3293[1]?

2. Have petitioners waived their right to assert a Fifth Amendment privilege during deposition questioning by responding to the same questions in prior discovery without asserting a Fifth Amendment privilege against disclosure at that time?

3. Have petitioners satisfactorily requested a stay of the underlying action?

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[1] Petitioners state this issue in the context of Title 18 U.S.C. section 3292 but their points and authorities here and in courts below have been in the context of Title 18 U.S.C. section 3293.

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STATEMENT OF THE CASE

Petitioners submitted claims to their insurer, Real Party in Interest, State Farm Fire and Casualty Company (hereinafter State Farm) for one fire and three theft losses arising out of a May 28, 1984 fire and one fire on December 24, 1984. State Farm paid petitioners approximately $512,883.17 for these alleged losses.

In 1988, petitioners entered individual pleas of *Nolo Contendere* to insurance fraud (violation of California Insurance Code section 556(a)(1)) regarding the filing of a false insurance claim. This admittedly false claim concerned the fire on December 24, 1984.

In November 1990, State Farm filed an action for fraud, misrepresentation and recision of the petitioners' insurance contract. On April 8, 1991, State Farm served interrogatories on petitioners asking for the basis of their defenses to State Farm's complaint. On May 14, 1991, they both answered these interrogatories by denying any fraudulent activity and did not raise any objections. On April 5, 1991, State Farm served request for admissions on petitioners. Petitioners were asked to admit to arson and insurance fraud relating to both fires. On May 14, 1991, they both answered these requests for admissions by denying any fraudulent activities and did not raise any objections.

Although petitioners denied any wrongdoing in their answers to interrogatories and request for admissions, petitioner, Sharon Mount, asserted a Fifth Amendment privilege against self-incrimination (regarding potential bank and wire fraud prosecution) at her deposition when asked about the source of both fires and the validity of

the insurance claims. Attorney for petitioners had advised State Farm's counsel that petitioner, Terrance Mount, will refuse to answer these same questions and assert his Fifth Amendment privilege.

Petitioners moved to limit their deposition and trial testimony based upon a Fifth Amendment right against self-incrimination to crimes relating to bank and wire fraud. The trial court overruled petitioners' Fifth Amendment objections and ordered petitioners to answer all further questions without raising this objection. The trial court overruled these objections because 18 U.S.C. sections 1343 and 1344, as interpreted by case law, requires a bank be the victim of fraud, be exposed to risk of civil liability or in some other fashion be made the target of the fraudulent activity. The sole target of petitioners' fraud was State Farm.

Petitioners' request for writ of mandate, prohibition or other relief with request for stay was denied by the Court of Appeal for the Third Appellate District of California. The Supreme Court of California also denied petitioners' application for stay and the petition for review.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the court's exercise of its discretionary jurisdiction. It does not involve an undecided issue of federal law regarding liability for bank fraud or wire fraud under Title 18 U.S.C. section 3293.

II. There is an independent basis under State law for the ruling of the lower court based upon petitioners'

waiver of their right to claim a Fifth Amendment privilege against self-incrimination.

ARGUMENT

Title 18 U.S.C. section 3293 provides a ten year limitation period for wire fraud offenses under 18 U.S.C. section 1343 if "the offense affects a financial institution" and for bank fraud offenses under 18 U.S.C. section 1344. By definition, bank fraud under 18 U.S.C. section 1344 occurs when a person either knowingly defrauds a financial institution[2] or knowingly obtains property under the custody or control of a financial institution by means of

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[2] At the time when these offenses occurred, 18 U.S.C. § 1344 provided:

> Whoever knowingly executed, or attempts to execute, a scheme or artifice – (1) to defraud a federally chartered or insured financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a federally chartered or insured financial institution, by means of false or fraudulent pretenses, representations, or promises; [shall be guilty of an offense against the United States].

A technical amendment in 1989 deleted the words "federally chartered or insured" from the section leaving just "financial institution."

Pub.L. No. 101-73, Title IX, § 961(k), Aug. 9, 1989, 103 Stat. 500. Apparently, no substantive change was intended by this amendment as the definition of "financial institution" for all of Title 18, now contained at 18 U.S.C. § 20, still encompasses federally chartered or insured institutions. (*United States v. Brandon*, 17 F.3d 409, 424 fn. 11 (1st Cir. 1994).)

false or fraudulent pretenses, representations, or promises. Title 18 U.S.C. § 1344.

Title 18 U.S.C. section 3293 provides a ten year statute of limitations for violation of Title 18 U.S.C. section 1343 or section 1344. Petitioners did not violate either statute because they did not knowingly defraud a financial institution or knowingly obtain property under a financial institution's control by means of false pretenses, representations or promises. Specifically, none of petitioners fraudulent acts were directed at a bank or exposed a bank to potential civil or criminal liability. Additionally, they did not commit an offense that affects a financial institution.

Furthermore, petitioners waived any right to assert a Fifth Amendment privilege at deposition or trial by their verified answers to discovery on these same issues without ever asserting a Fifth Amendment privilege.

The Fifth Amendment protection against compelled self-incrimination is limited to when a witness has reasonable cause to apprehend danger from a direct answer. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). At the time petitioners answered interrogatories and request for admissions they were represented by counsel.

Petitioners assert they face potential prosecution for mail fraud (18 U.S.C. § 1343) and/or bank fraud (18 U.S.C. § 1344) under 18 U.S.C. § 3293. For reasons stated below, this fear is unfounded and their subsequent assertion of any Fifth Amendment privilege is unwarranted.

I.

PETITIONERS HAVE NO BASIS UPON WHICH TO CLAIM A FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION BECAUSE THEY FACE NO THREAT OF CRIMINAL PROSECUTION UNDER EITHER 18 U.S.C. SECTION 1343 OR 18 U.S.C. SECTION 1344.

A. Petitioners Did Not Commit An Offense Which Affects A Financial Institution.

The controlling authority under the facts of the instant case is *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988)[3] which holds that the bank fraud and/or mail fraud statutes do not apply to "situations where money is merely withdrawn legally from a federally insured bank by a victim and where the bank itself is no way victimized." *Id.*, at 904. In *Blackmon*, con artists persuaded women to withdraw their own money from a bank and convert it to foreign currency which was given to the con

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[3] *Blackmon* is controlling because it interprets the scope of bank fraud statutes in the context of a criminal prosecution for both mail and bank fraud. The court specifically refused to allow an overbroad interpretation of the term "custody and control," (as used in context of a bank fraud case). In *Blackmon*, in the context of a mail and bank fraud case, the court did not extend the definition of either mail or bank fraud statutes. "The legislative history of the bank fraud statutes strongly indicates that Congress intended that it have the same broad scope as the mail fraud statutes, 18 U.S.C. § 1341 *et seq.*" *United States v. Bonallo*, 858 F.2d 1427, 1432 (9th Cir. 1988). Therefore, the narrower interpretation of the statutory terms used in *Blackmon* should be used when defining terms in both 18 U.S.C. § 1343 (mail fraud) and 18 U.S.C. § 1344 (bank fraud).

artist. *Id.* Defendants were found guilty by the trial court of bank fraud and mail fraud under sections 18 U.S.C. 1344 and 1343. *Id.*, at 902. The court of appeal reasoned that withdrawal of money from the banks was legal because it was done "by means of false or fraudulent pretenses, representations, or promises" as outlined by 18 U.S.C. § 1344(a)(2). Rather, they were merely legal withdrawals by the victims. *Id.*, at 904. Thus, even if the legal withdrawal of money was imputed to defendants, these acts did not constitute criminal conduct.

In reaching its holding, the *Blackmon* Court reviewed the legislative intent behind 18 U.S.C. sections 1343 and 1344. The statutes should only be applied to schemes to defraud a "national credit institution . . . or protect the financial integrity of a federally controlled or insured bank." *Id.*, at 906. The court in *Blackmon* recognized that if the bank fraud statute (18 U.S.C. section 1344) applied to the facts before it, then the statute could apply to any situation where "property purchased with money legally withdrawn from a federally insured bank was later fraudulently obtained." Therefore, the *Blackmon* Court reversed the trial court conviction under the bank fraud statute. *Id.*, at 917.[4]

Petitioners assert that whether a bank ever has "custody or control of the monies" is the pivotal inquiry in

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[4] This same concern, that all fraud would be covered by this statute when money is legally withdrawn from a bank, was raised by the trial court in this case. Specifically, if petitioners could be guilty of bank fraud because their victim paid with a check then every fraudulent scheme involving the use of a check would trigger a potential bank fraud prosecution.

determining whether a fraud affects a financial institution within the meaning of 18 U.S.C. § 3293. Thus, they assert that a fraud victim's issuance of a check from its bank is a sufficient "nexus" between defendants' conduct and the bank to constitute bank fraud. However, *Blackmon* makes it clear that the bank fraud statute does not apply to situations where a victim merely withdraws money from a federally insured bank. *Id.*, at 904. State Farm legally withdrew funds from its own bank when it issued a draft to the petitioners. Not only was this an exercise of its right as a depositor, but State Farm could have maintained an action against the bank had it improperly dishonored these valid checks. *Allen v. Bank of America*, 58 Cal.App.2d 124, 127 (1943).

In refusing to extend criminal liability for bank or wire fraud to cases where a victim's money had "at one time been under the custody or control of a federally insured bank" the *Blackmon* Court recognized:

> If a statute applied to these facts, it could apply to any situation where property purchased with money legally withdrawn from a federally insured bank was thereafter fraudulently obtained. The statute does not 'plainly' yield such an extraordinary result. *Id.*, at 904.

The *Blackmon* Court did an exhaustive search of applicable legislative history, regarding 18 U.S.C. section 1341 and 1343. *Blackmon* states:

> The [House Judicial Committee] committee, however, is concerned by the history of expansion and interpretations of that language [i.e., "scheme to defraud" in 18 U.S.C. section 1341 and section 1343] by the courts. The current

> scope of wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions. *Id.*, at 906.

Before a criminal prosecution for bank fraud is warranted, "it was Congress' intent that a federally insured or chartered bank must be the actual or intended victim of the scheme." *United States v. Stavroulakis*, 952 F.2d 686, 694, *cert. denied*, 118 L.Ed.2d 580 (2nd Cir. 1992).

To extend bank fraud liability under 18 U.S.C. § 1344 or wire fraud liability under 18 U.S.C. § 1343 to all cases in which transfers made from a defrauded individual to the defendant, via a check, would contravene the logic of *Blackmon* and do nothing to advance the legislative intent behind the creation of these statutes. Thus, the fact that State Farm issued petitioners drafts from its bank account as a result of petitioners' fraudulent conduct *directed solely toward State Farm* is an insufficient basis to extend the statute of limitations under 18 U.S.C. § 3293 for an offense that "affects the financial institution."

B. Petitioners Did Not Violate 18 U.S.C. Section 1344 Because They Did Not Specifically Intend To Deceive A Bank.

Title 18 U.S.C. section 1344(a)(1) requires that a defendant direct his fraud toward a bank.

> [A] conviction under the "scheme to defraud" clause of the bank fraud statute requires that the defendant engage in or attempt to engage in a pattern or course of conduct designed to deceive

> a federally chartered or insured financial institution into releasing property. *United States v. Stavroulakis, supra,* 952 F.2d 686, 694.

The specific intent requirement of 18 U.S.C. § 1344 has been examined in several cases. *United States v. Mason* 902 F.2d 1434 (9th Cir. 1990), involved defendants who operated a prostitution ring and subsequently sent credit card slips to a co-defendant in California who had a merchant account with a bank. The California defendant received immediate credit through the bank for the amount of the deposited credit card sales drafts and sent a percentage of his profit to his partners in the prostitution ring. The California merchant did not disclose to the bank that he processed credit card sales for prostitution agencies. Subsequently, the bank lost money due to numerous customer disputes on the sales slips deposited with the account. In other words, the bank was directly defrauded.

In finding the defendants guilty of bank fraud under 18 U.S.C. § 1344, the *Mason* court ruled "A business applicant who misrepresents the true nature of the business would secure credit solely on the basis of the false statements." *Id.,* at 1442. The evidence in *Mason* showed that the bank would not have opened a merchant account for defendant had it known that he would process third-party credit card slips or was laundering credit charges for a prostitution ring. Based on these facts the specific intent to defraud a bank, as required by the statute, was found to exist.

In *United States v. Swearingen,* 858 F.2d 1555 (11th Cir. 1988), (per curiam), *cert. denied,* 489 U.S. 1083 (1989), two automobile dealers devised a scheme to obtain interest-

free loans. They fabricated automobile sales intended to deceive their bank into giving each dealer immediate credit by increasing the checking account balances in the amount of the fictitious sales. Documents were given to the bank as evidence of the purported sales. Defendants argued that they did not intend to defraud the bank because they were actually selling one another car titles. *Id.*, at 1556.

The court held that: "Defendant knew that the bank believed that the envelopes [containing title documents] represented actual, legitimate sales of vehicles, and that he used that perception to deceive the bank in order to obtain an immediate credit on non-existent sales." *Id.*, at 1557. Thus, these were false factual assertions made by defendant with the *specific intent to defraud the bank.*[5] In other words, the bank was directly defrauded.

In *United States v. Bonallo,* 858 F.2d 1427 (9th Cir. 1988), a bank employee withdrew cash from an automatic teller using his ATM card and then used the bank's computer system to change the ATM card numbers so that the withdrawal was charged to the account of another bank customer. Defendant claimed he could not be convicted under § 1344 because the requisite scheme to "defraud" the bank did not occur until after the cash was already taken. Rejecting the defendant's contention, the

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[5] In the present case there were no false or deceptive representations to State Farm's bank by defendants. All of the deceptive representations were made directly and only to State Farm. Each of the above cases dealt with defendants intending to deceive banks not bank customers.

Bonallo court surmised: "All that is necessary is the existence of a knowing and material misrepresentation designed to deceive, specific intent, and use of the mails or wires in furtherance of the scheme." *Id.*, at 1433. The bank was required to reimburse the accounts that had been wrongly charged. Thus, the bank was exposed to potential monetary loss and the bank was the intended victim, not the customers. Defendant's fraud was actually a theft from the bank.

In the present case, there have been no false or misleading statements made by defendants *to State Farm's bank*. Defendants' misrepresentations were *directed exclusively at State Farm* with an intent to defraud that entity alone. It was of no concern to the petitioners where State Farm obtained the funds they ultimately received. Thus they lacked the specific intent to defraud any bank or entity other than State Farm.

The party asserting a privilege is required to provide sufficient information for the court to make an informed decision regarding an objection to discovery based upon that privilege. *Blackburn v. Superior Court*, 21 Cal.App.4th 414, 432-433 (1993). Petitioners have produced no evidence to establish their specific intent, under 18 U.S.C. § 1344, to defraud a bank. Therefore, their request for Fifth Amendment immunity from prosecution for bank fraud under that statute should be denied.

C. Petitioners Did Not Violate 18 U.S.C. Section 1344 Because They Did Not Knowingly Obtain Monies Under The Custody And Control Of A Federally Chartered Or Insured Financial Institution By Means Of False Or Fraudulent Pretenses, Representations Or Promises Directed Toward A Bank.

Petitioners cite numerous case excerpts and statutes in support of their very broad contention that a bank is affected even when fraud is directed toward a bank customer. Based on this contention, petitioners argue that fraud on the bank's customer causes the bank to lose custody or control of money and this is sufficient to constitute bank fraud. Citing *United States v. Brandon*, 17 F.3d 409 (1st Cir. 1994) petitioners urge that 18 U.S.C. section 1344 requires only that petitioners victimize a bank by means of a fraudulent scheme directed at bank customers. However, the *Brandon* Court did not intend for the ruling to be interpreted so broadly:

> We do not address whether any scheme to defraud, regardless of its intended victim, can be prosecuted under the bank fraud statute as long as it has some detrimental effect on a federally insured bank. In this case at least, the government did prove the scheme was intended to defraud a financial institution: Homeowners or East West, if not Bay Loan itself. *United States v. Brandon, supra*, 17 F.3d 409, 427.

Petitioners have misconstrued the cases they cited in support of their broad assertion that a fraudulent scheme directed solely at a bank customer actually defrauds the bank.

United States v. Harris, 805 F.Supp. 166 (S.D.N.Y. 1992) illustrates this point. At issue in *Harris* was the sufficiency of the government's allegations based on bank fraud violations under 18 U.S.C. § 1344 and wire fraud under 18 U.S.C. § 1343. *Id.*, at 171. In *Harris* several corporations (controlled by defendant Harris) borrowed money from a consortium of banks under a revolving credit agreement. Creation of this agreement was based upon the approval of lenders who relied on reports submitted by Harris. These reports informed the lenders whether loan covenants were being met. Defendant filed fraudulent reports with these banks, resulting in loans exceeding $200,000,000 based on collateral of less than $35,000,000. Harris and other officers were charged with fraudulent inducement to lend. *Id.*, at 168-170. The *Harris* court stated:

> To charge an offense under the bank fraud statute, 18 U.S.C. § 1344, the government must allege conduct by a defendant designed to deceive a financial institution into releasing property, with the intent to victimize the institution by exposing it to actual . . . loss. *United States v. Harris, supra*, 805 F.Supp. 166, 171.

The *Harris* court reasoned that this is exactly what defendant Harris had done in his dealings with the bank. Harris gave the banks financial assurances in order to obtain loans he would not have otherwise received. The *banks* relied upon Harris' fraudulent assurances, which concealed speculative trading and falsified documents. *Id.*, at 171-172. *The banks were the direct intended victims of Harris' conduct.* This conduct was the type of conduct which warranted prosecution for bank fraud. *Id.*, at 171.

In the case at bar, petitioners argue that State Farm's bank was the intended victim of petitioners' insurance fraud scheme because it lost "custody and control" of money paid by State Farm to petitioners under petitioners' false insurance claims. There is no correlation between a defendant who purposefully and *directly defrauds a bank* in order to obtain funds from it (e.g. by fraudulently overstating values, concealing speculative trading and falsifying documents) and the facts of this case where the misrepresentations were made to a third party, State Farm, causing State Farm to *legally* withdraw money from its bank. Defendants cannot show any direct misrepresentations to the *bank* made by them, or reliance by the *bank* on any of their representations, or direct release of funds by the *bank* based upon these representations. The facts of this case stand in stark contrast to the facts of *Harris*. Clearly, the direct victim of the petitioners' fraud (under the rule in *Harris*) is State Farm.[6]

Defendants' interpretation of *United States v. Blackmon, supra,* 839 F.2d 900 is equally incorrect and too narrow. The emphasis in *Blackmon* was on the terms "property . . . unlawfully obtained at a time when it was under the custody or control of a bank" (*Id.*, at 905-906) as it refers to situations in which the *bank* faces the risk of civil liability for improperly releasing a depositor's funds. *United States v. Dix,* 491 F.2d 225, 227 (9th Cir. 1974).

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[6] Even petitioners do not argue that State Farm is a "financial institution" within the meaning of either 18 U.S.C. § 1343, § 1344 or § 3293.

In the instant case, State Farm's bank risked no civil liability when it released funds to petitioners. In fact, the bank had a duty to release those funds upon request of its depositor (State Farm) and would be liable in damages to its customer if it did not honor a valid check. *Allen v. Bank of America, supra,* 58 Cal.App.2d 124, 127. Clearly, when taken in context, the words "custody or control" in section 1344 are not dispositive of liability under either the bank fraud or mail fraud statutes. The words are intended to describe custody and control and the risk of civil liability for its action associated with the bank fraud. Additionally, it defines where the money which is the goal of the fraud is located. In other words a defendant's acts must be directed toward money under custody and control of a bank *and* the act must be directed at the bank.

This point is further supported by *United States v. Morgenstern,* 933 F.2d 1108, *cert. denied* 112 S.Ct. 1188 (2nd Cir. 1991), which is clearly distinguished from *Blackmon* because *Morgenstern* did not involve the lawful withdrawal of money from a bank (as was the case in *Blackmon*). The defendant in *Morgenstern* was able to fraudulently obtain the money only by means of conduct *directed at the bank itself,* thereby inducing the bank to allow withdrawal of funds. *Id.,* at 1113-1114. The *Morgenstern* court's concluded that the bank was the "intended victim" of the fraudulent scheme because of the subsequent civil liability of the bank to its account holder. *Id.*

Petitioners cite *United States v. Simpson,* 950 F.2d 1519 (10th Cir. 1991) for the proposition that "the test is whether *the Bank* was defrauded of something, which may include being defrauded of its right to have custody

of the funds . . . " *Id.*, at 1523, footnote one. However, *Simpson* involved schemes to loot a small bank principally owned, controlled and managed by a defendant who had ordered illegal cash transfers in the bank. *Id.*, at 1520. Again, the fraud was directed at the bank, not an account holder.

Likewise, *United States v. Biggs*, 965 F.2d 10, *cert. denied* 113 S.Ct. 1016 (5th Cir. 1992), supports State Farm's proposition that in order to be considered the target or victim of fraud, the custodial bank need only be exposed to the risk of civil liability from its depositor. *Id.*, at 12-13. *Biggs* involved an employee whose responsibilities included investment of surplus cash in company accounts at financial institutions. This employee initiated unauthorized transfers. The *Biggs* court found that was bank fraud. The victim was the bank not the account holders because the bank had ultimate responsibility to its customers for any losses. Thus, the "custody and control" contemplated by the statute and case law only operates within the context of *banks* facing potential civil liability for their act of releasing funds. In this case, State Farm's bank was under an obligation to release the funds, it faced no potential civil liability as a result of such release, and the authorities cited by petitioners are simply not on point.

II.

PETITIONERS' PRIOR DISCOVERY RESPONSES, WITHOUT ANY OBJECTION, WAIVED THEIR RIGHT TO SUBSEQUENTLY ASSERT A FIFTH AMENDMENT PRIVILEGE

Petitioners' answers to State Farm's requests for admissions and interrogatories denied any wrongdoing in connection with the May 1984 and December 1984 fires, the proof of loss documents submitted regarding those fires, and the proof of loss documents submitted with regard to the three thefts which allegedly occurred in May and June 1984. Petitioners' verified responses, without objection, waived petitioners' right to subsequently assert a Fifth Amendment privilege on the same subject.

If an objection to a discovery request is not raised in a timely manner, the objection is waived. *United States v. Kordel*, 397 U.S. 1, 11-12 (1970); *Brown v. Superior Court*, 180 Cal.App.3d 701, 709 (1986); *Deyo v. Kilbourne*, 84 Cal.App.3d 771, 785 (1978); See also, *Coy v. Superior Court*, 58 Cal.2d 210, 216-217 (1962); *Leach v. Superior Court*, 111 Cal.App.3d 902, 906 (1980).

> Numerous cases have held that if an objection to interrogatories is not raised within that 30-day period, the objection is waived, absent good cause for relief from default. *We see no basis for treating the privilege against self-incrimination differently than any other privileges which may be so waived.* [emphasis added] *Brown v. Superior Court, supra*, 180 Cal.App.3d 701, 709.

In *Brown*, the defendants were served with interrogatories. No answers or objections to the interrogatories were filed and plaintiff moved for a motion to compel. The court ordered defendants to answer the interrogatories. Defendants failed to answer the interrogatories under court order. After plaintiff filed a second motion to compel, defendants served written objections to the interrogatories, including a Fifth Amendment privilege objection. The appellate court held that if a party fails to assert the Fifth Amendment privilege in response to a valid discovery request, the *objection is waived. Brown v. Superior Court, supra,* 180 Cal.App.3d 701, 709.

In the case at bar, petitioners did not raise the Fifth Amendment privilege in their responses to State Farm's requests for admissions or in their answers to State Farm's interrogatories. In fact, petitioners filed verified denials to the requests for admissions and interrogatories. Therefore, petitioners have waived their right to assert a Fifth Amendment objection.

The trial court relied upon *Alvarez v. Sanchez,* 158 Cal.App.3d 709 (1984) to support its conclusion that petitioners did "not waive this privilege by furnishing testimony prior to trial." *Id.*, at 715. *Alvarez* concerned defendants in a civil action who refused to testify based upon their privilege against self-incrimination. *Id.*, at 711. The trial court held that defendants had waived their privilege against self-incrimination by filing a verified answer to the complaint, and struck the portion of the defendants' answer that constituted denials. The appellate court reversed, holding that striking the answer was unduly harsh as it relieved plaintiff of its obligation to

prove its case, and imposed a civil forfeiture upon defendants for a good faith exercise of their constitutional rights. *Id.*, at 714. The *Alvarez* court reasoned that the same principles applied regardless of whether the civil defendant invoked their constitutional rights at *pretrial* proceedings or *at trial*. Because defendants were able to introduce other evidence to establish their affirmative defenses, it was error to deny them the opportunity of trying the case. *Id.*

The instant case is highly distinguishable from the facts of *Alvarez*. The defendants in *Alvarez* made timely assertions of their Fifth Amendment privilege throughout the discovery process. It was only their verified answer to the complaint which was alleged to have constituted a waiver. *Id.*, at 711. In contrast, petitioners in this case answered interrogatories and responded to requests for admissions with outright denials when the opportunity to claim the Fifth Amendment privilege was a viable alternative. Because they chose to partially disclose facts surrounding the fires and subsequent misrepresentations rather than claiming a privilege against self-incrimination, petitioners impliedly and constructively waived their privilege with regard to other facts connected with those events. *Regents of Univ. of Calif. v. Superior Court*, 200 Cal.App.2d 787, 791 (1962).

The issue presented in *Alvarez* was entirely different than the instant case. The issue in the instant case is not whether the appropriate *remedy* is striking that portion of petitioners' answer constituting denials and allowing the case to proceed as a default matter. Here, the issue is whether petitioners waived their rights to claim a Fifth

Amendment privilege because they did not raise the objection in response to prior discovery.

The cases relied upon by the *Alvarez* court in support of the broad proposition that a witness is "free to assert the privilege at trial even though he or she had given testimony during pretrial proceedings" referred to the right of a *criminal defendant* to claim the Fifth Amendment privilege at trial where he had voluntarily testified at either a preliminary hearing or a grand jury proceeding, (*Overend v. Superior Court,* 131 Cal. 280, 284 (1900); *People v. Maxwell,* 94 Cal.App.3d 562, 570 (1979)), or the right of a witness to refuse to testify in the *separate* criminal proceeding of a co-defendant when that witness was appealing a criminal conviction in his own proceeding. *People v. Lopez,* 110 Cal.App.3d 1010 (1980).

The law governing the absolute Fifth Amendment privilege of a criminal defendant is distinct from that which governs the Fifth Amendment privilege of civil witnesses. 2 *Witkin,* Evidence §§ 1310 through 1421. The right of a criminal defendant to refuse to take the stand in his own criminal trial is fundamentally different than a civil defendant's right to deny, answer or object to interrogatories. As the *Alvarez* case did not deal with the failure to assert a privilege during civil discovery, any supposed "rule" pertaining to such a factual scenario from that case is only dicta and inappropriate to apply in this case.

Thus, the rule in *Brown v. Superior Court, supra,* 180 Cal.App.3d 701, is in accord with the rule enunciated by this court in *United States v. Kordel, supra,* 397 U.S. 1, 11-12. The court in *Kordel* held that if a party that fails to

raise a Fifth Amendment objection during discovery then the privilege is waived. *Id.* at p. 9-10. Therefore, petitioners have waived their right to assert a Fifth Amendment privilege to questions they have already substantively answered.

III.

PETITIONERS HAVE NOT PROPERLY SOUGHT A STAY OF THE UNDERLYING ACTION

In their conclusion, petitioners improperly requested this court issue an order staying and vacating the lower court rulings. State Farm has received no notice of any application for stay filed on petitioner's behalf pursuant to 28 U.S.C. section 2101 (f). A mere petition for certiorari before the Supreme Court will not affect a stay of the action. *Peabody Coal Co. v. Navajo County*, 572 P.2d 797 (1977). If the court grants petitioners' writ for certiorari, State Farm requests specific clarification regarding whether a stay is granted.

CONCLUSION

The above-mentioned authorities establish that in order for the ten year statute of limitations in 18 U.S.C. § 3293 to apply to prosecution for bank fraud under 18 U.S.C. § 1344 or mail fraud under 18 U.S.C. § 1343, the bank must be exposed to risk of loss by means of civil liability or be the target of a petitioner's deceptive activity. Mere loss of property that at one time was under the

custody or control of a financial institution is not sufficient to warrant criminal prosecution under the bank fraud or wire fraud statutes at issue.

Therefore, petitioners face no potential liability for these crimes and have no basis upon which to claim a Fifth Amendment privilege. Furthermore, any Fifth Amendment privilege which may have existed in this regard was waived by petitioners' verified discovery answers. Accordingly, it is respectfully requested that this Court not exercise its discretionary jurisdiction and that this petition for writ of certiorari be denied.

Respectfully submitted,

JAMES R. PAGLIERO, ESQ.
California State Bar #095898
PAGLIERO, CARTER & BAUER
1851 Heritage Lane, Suite 201
Sacramento, California 95815
Telephone: (916) 641-7273
Attorneys for Real Party in Interest State Farm Fire and Casualty Company